Supreme Court, U.S.
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No. 95-___

In The

Supreme Court of the United States

October Term, 1995

BERNARD SCHWARTZ,

Petitioner,

v.

DOC'S FOOD STORES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Oklahoma, Division No. 1

PETITION FOR A WRIT OF CERTIORARI

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May 29, 1996

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QUESTION PRESENTED

Whether a state statute imposing the "loser-pays" rule, under which the loser in a case is required to pay the prevailing party's attorney fees, violates the Due Process Clause of the Fourteenth Amendment, since it substantially burdens the fundamental right of access to the courts and is not supported by a compelling state interest and is not narrowly drawn.

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PETITON FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OKLAHOMA, DIVISION NO. 1

Petitioner Bernard Schwartz respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of Oklahoma, Division No. 1, in this case.

OPINION BELOW

The opinion of the Oklahoma Court of Appeals is unreported. It is reproduced, starting at page 1 of the Appendix to this petition.

JURISDICTION

The Oklahoma Court of Appeals issued an opinion dated February 13, 1996, affirming award of attorney fees to respondent, as well as an order on February 22, 1996, for the setting of an appellate attorney's fee. The Supreme Court of Oklahoma denied a petition for certiorari to review the Court of Appeals decision on April 30, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment provides: "No state shall deprive any person of life, liberty or property without due process of law."

12 Oklahoma Statutes § 936 provides: "In any civil action to recover on a negotiable instrument, . . . the prevailing party shall be allowed a reasonable attorney fee to be set by the court. . . . "

STATEMENT OF THE CASE

This case arose out of an action in the Small Claims Court in Tulsa, Oklahoma, seeking payment on a $400 check issued by petitioner. The court rendered judgment for respondent on August 16, 1994, for the amount of the check, as well as $67 costs, and $200 in attorney fees.

On August 18, 1994, petitioner filed a Petition for Rehearing and Reconsideration in the trial court which challenged the constitutionality of the attorney fee award. No action has been taken on this Petition. On August 26, 1994, the Journal Entry of Judgment was filed. Petitioner filed a Petition in Error in the Oklahoma Supreme Court on September 22, 1994 – the only method of appeal from a small claims judgment under Oklahoma law. The Petition in Error specifically challenged the award of attorney fees "[b]ecause award of attorney fees to the prevailing party in such an action in Small Claims Court substantially burdens the fundamental right of access to the courts, unsupported by a compelling governmental interest, and hence violates the Constitution of the United States and the Constitution of the State of Oklahoma."

On July 21, 1995, the Oklahoma Supreme Court assigned the case to the Oklahoma Court of Appeals, Division No. 1. That court issued an opinion on February

13, 1996, affirming the judgment of the trial court, including the order "granting . . . prevailing party fees." The Oklahoma Court of Appeals opinion noted that petitioner "challenges the trial court's award of attorney fees." (Appendix 3) It then went on to state that 12 Oklahoma Statutes § 936 authorizes an award of prevailing party attorney fees in such an action and that "[b]ecause the legislature has specifically provided for attorney fees in cases such as the instant case, we cannot say the trial court erred in its award of attorney fees." (*Ibid.*). This was, of course, no answer to petitioner's claim that the statute requiring the loser to pay attorney fees was itself unconstitutional. Understandably perhaps, the Oklahoma Court of Appeals headed its opinion, "NOT FOR PUBLICATION," though it is reproduced starting at page 1 of the Appendix to this petition.

On February 22, 1996, the Oklahoma Court of Appeals ordered the trial court to determine an appellate attorney's fee to be awarded to respondent. On February 26, 1996, petitioner filed a petition to the Oklahoma Supreme Court for a writ of certiorari to the Oklahoma Court of Appeals, Division No. 1. On April 30, 1996, the Oklahoma Supreme Court exercised its discretionary review power by denying, without opinion, the petition for certiorari.

REASONS FOR GRANTING THE WRIT

This case may appear a piddling one so far as the amount at stake is concerned. But it raises an important constitutional issue that is bound to grow in consequence

because of the widespread movement for legislative enactment of the loser-pays rule in a wide variety of civil cases. As will be shown, such a rule unconstitutionally burdens the fundamental right of access to the courts. It "chills" the right to bring or defend lawsuits. Instead, in the recent words of the Ninth Circuit, for those without deep pockets who have to "hurdle an attorneys' fee barrier . . . [p]utting up with a little injustice might be better." *Moore v. Local 569 of International Brotherhood of Electrical Workers*, 53 F.3d 1054, 1058 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 908 (1996).

I. THE DECISION BELOW IS INCONSISTENT WITH A RECENT NINTH CIRCUIT DECISION.

The Ninth Circuit decision in the *Moore* case struck down a provision under which any party unsuccessfully challenging an arbitration decision had to pay the attorney fees of the prevailing party on the ground that it violated the right to institute a court action – a right "clearly intended to preclude restraints" upon the right "to seek relief from courts." *Id.* at 1056. According to the Ninth Circuit, such "a fee provision . . . would serve to chill . . . rights to contest the results . . . in court." *Id.* at 1057.

It is recognized that the *Moore* fact pattern was not on all fours with that in the instant case, since the provision for shifting attorney fees there was contained in a collective bargaining agreement and plaintiff relied upon a statutory right to bring a court action. Yet the *Moore* decision is surely relevant to a statute requiring the loser-pays rule which burdens the constitutional right of access

to the courts. Particularly pertinent is the Ninth Circuit's language (in small part already quoted):

> Despite suspicions that appellate judges do not understand the real world, we do understand that the threat of attorneys' fees can be a real deterrent to the assertion of rights. They can be thought of as a kind of penalty. . . . They can even become oppressive and 'disproportionate to the magnitude and importance of the causes in which they are taxed. . . . ' *Alyeska Pipeline Service Co. v. Wilderness Soc'y*, 421 U.S. 240, 252 n. 24 (1975) (citation omitted.) Similarly, we have recognized that the possibility of being subjected to large fee awards if they lose does undercut [the] desire and ability to pursue their causes. . . . All of this can even be true if the plaintiff is pretty, or very, sure that he is correct. It would take a hearty soul with an awfully important principle at stake to run the risk of, say, a . . . fee award. *Putting up with a little injustice might be better. Id.* at 1058 (Emphasis added).

II. AWARD OF ATTORNEY FEES TO THE PREVAILING PARTY IN THIS ACTION VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT SINCE IT SUBSTANTIALLY BURDENS THE FUNDAMENTAL RIGHT OF ACCESS TO THE COURTS AND IS NOT SUPPORTED BY A COMPELLING GOVERNMENTAL INTEREST AND IS NOT NARROWLY DRAWN.

If what the Ninth Circuit says applies in a case involving a statutory right to seek court relief, it should apply as well in the instant case involving a *constitutional*

right of access to the courts – a *fundamental* right which requires the strictest standard of scrutiny.

It has been settled by this Court that access to the courts is a fundamental right and that restrictions upon such a right are to be reviewed under a standard of strict scrutiny. *Boddie v. Connecticut*, 401 U.S. 371 (1971). The courts have "recognized the right of access to the courts as declared in *Boddie* and rejected the view that *Boddie* should be limited to divorce cases." *Bozarth v. Atlantic Richfield Oil Co.*, 833 P.2d 2, 5 (Alaska 1992) (dissent in part). *Boddie* is particularly applicable "where the state makes judicial decision the only lawful means of resolving the underlying dispute." Tribe, *American Constitutional Law* 1462 (2d ed. 1988). See *United States v. Kras*, 409 U.S. 434, 445 (1973) ("exclusiveness of court access and court remedy . . . a potent factor"). This means that legislative restrictions upon a fundamental right such as "the fundamental right to equal litigation opportunity", Tribe, *supra* at 1461, violate the United States Constitution unless they are supported by a compelling state interest. "Since the classification here touches on [a] fundamental right . . . , its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest." *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969).

This is, of course, true in both equal protection cases such as *Boddie v. Connecticut, supra*, and due process cases such as this case, see Rehnquist, J., dissenting, in *Roe v. Wade*, 410 U.S. 113, 173 (1973), as well as in cases involving other fundamental constitutional rights, *Shapiro v. Thompson, supra*.

The loser-pays requirement does substantially burden the right of access to the courts. This is true even though the requirement does not prohibit anyone from bringing or defending a case. As the Ninth Circuit puts it: "We are told the employee can sue all he wants, he just had better be successful. If he is not, he must pay out a great deal of money." *Moore v. Local 569*, 53 F.3d at 1058.

It can perhaps be argued that requiring attorney fees to be paid to prevailing parties furthers the state interest in reducing litigation by deterring frivolous lawsuits and defenses. Even if that state interest is substantial, in this case the interest is not being furthered by a statute that is narrowly drawn – i.e., aimed only at frivolous litigation. Instead, the relevant Oklahoma legislation "has too much the flavor of throwing out the baby with the bath water." *Barr v. Matteo*, 360 U.S. 564, 589 (1959). It is not aimed only at meritless litigation; instead, it is so overinclusive that it sweeps all actions coming under the fee-award statute within its purview.

The effect of awarding the prevailing party's attorney fees, particularly in a Small Claims Court case, is to deter, if not suppress, the assertion of rights by the litigant without a deep pocket. The basic policy behind the general refusal to apply the so-called English rule awarding attorney fees to lawsuit winners has been stated by this Court: "that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel." *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967).

The award of attorney fees clearly has an adverse effect upon the right of access to the courts. "For where in order to seek judicial remedies, a plaintiff must risk the liability for the full amount of attorney's fees the other side sees fit to incur, it takes little imagination to foresee that the size of a party's bank account will have a major impact on his access to the courts." *Bozarth v. Atlantic Richfield Oil Co.*, 833 P. 2d at 4.

The same point is made in a Report of the American Bar Association Section of Litigation, submitted to the House of Delegates last year:

> First, and most important, it undermines access to the . . . courts by the middle class and the poor . . . the fact that the individual or small company might be liable not just for their lawyer's fees but for double those fees means that the access to the courthouse will be reduced.
>
> The rule is in effect a regressive tax on the right to litigate. . . .
>
> The problems with loser-pays legislation were best highlighted by the Federal Courts Study Committee chaired by Judge Joseph F. Weis, Jr. of the Third Circuit Court of Appeals . . . "Although sometimes advocated, a general rule making losing parties fully liable for the winners' reasonable attorney fees is a radical measure that would be inconsistent with traditional American attitudes toward access to courts. Such a rule would work harshly in close cases, especially when a party advocates a position that is reasonable but is nevertheless unsuccessful. It might excessively discourage parties with plausible but not clearly winning claims, particularly when a prospective party is risk

> averse – as is likely to be true of middle-class persons who cannot risk a big loss. . . . "

It is significant that a leading English periodical, *The Economist*, recently called for the abandonment of the loser-pays rule in the country of its origin. As reported in Lewis, *Tilting the Scales*, *New York Times*, February 3, 1995, p. A19,

> "Enormous numbers of mostly middle-class people" simply cannot use the courts, The Economist said, because they must pay for the other side's lawyers if they lose. "For most people this means that they are risking financial ruin."
>
> Today in Britain, The Economist said, "only the very wealthy can afford the costs and risks of most litigation. This offends one of the most basic principles of a free society: equality before the law."

The attorney fees awarded in a small claims case such as this may be small in amount. But that may not be the case in other actions. Indeed, the loser-pays rule often requires the litigant "to risk enormous fee awards." *Moore v. Local 569*, 53 F.3d at 1057. Thus, the district court in *Moore*, upheld an award of $244,104.01 against the union member who had brought the action. Similar large awards were made in two recent cases in Alaska, which had adopted a general loser-pays rule. In the first, a discharged oil company employee, who had repeatedly complained about unsafe company practices, sued, claiming that his firing was in retaliation for whistle-blowing. Defendant won the case and an award for $76,000 in attorney's fees was upheld, though the court did state

that such an award was "disturbing." *Bozarth v. Atlantic Richfield Oil Co.*, 833 P.2d at 3.

The second case was also a wrongful termination case won by the employer. This time the court upheld an award of $117,251 in attorney's fees. *Van Huff v. Sohio Alaska Petroleum Co.*, 835 P.2d 1181 (Alaska 1992).

Can it be doubted that future discharged whistle-blowers and other employees will be deterred from bringing and defending even meritorious cases when they know that they will incur the risk of such large attorney-fee awards? In the words of another Alaska opinion, "Foreknowledge that such a sizeable sum would be awarded as attorney's fees in the event of her losing . . . could well have constituted an impediment to access to the courts preventing litigation of an issue which she had every right to have resolved." *Sloan v. Atlantic Richfield Co.*, 552 P.2d 157, 162 (Alaska 1976) (dissent).

This statement is particularly appropriate in the instant case, where the loser-pays rule has been applied in a Small Claims Court case. Where the amount in controversy is so small, the knowledge that attorney fees can be assessed will normally have a conclusive impact upon the risk-averse party, particularly one without a deep pocket. Rather than run the risk, even a meritorious case will normally not be litigated.

Neither the interest in deterring litigation, nor any other purpose behind the loser-pays rule is a *compelling* state interest sufficient to override the fundamental right of access to the courts protected by the Due Process Clause of the Fourteenth Amendment.

III. THE QUESTION PRESENTED IS AN IMPORTANT ONE WHICH WARRANTS THIS COURT'S REVIEW.

The constitutional question presented by this petition is a significant one that has never been decided by this Court. Moreover, it is one that is becoming increasingly important, in view of the recent movement to limit access to and damages awarded by the courts. This Court should lead the way and use this case to decide the constitutionality of loser-pays statutes that restrict the right of access to the courts.

The Ninth Circuit has urged that the courts "must be vigilant in assuring that rights of access to the courts are not to be watered down, but the attorneys' fee provision . . . has just that effect." *Moore v. Local 569*, 53 F.3d at 1058. See also *Service Employees International Union v. Local 1199*, 70 F.3d 647, 654 (1st Cir. 1995): "courts must be ever vigilant in protecting that right [of access to the courts] against indirect and subtle devices as well as against direct and obvious limitations."

Shall it be said that this Court is less vigilant than the Federal Courts of Appeals?

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

NOT FOR PUBLICATION

IN THE COURT OF APPEALS OF THE
STATE OF OKLAHOMA

DIVISION NO. I

DOC'S FOOD STORES, INC., Appellee,	)	
vs.	)	Case No. 84,368
BERNARD SCHWARTZ, Appellant.	)	(Filed Feb. 13, 1996)

APPEAL FROM THE DISTRICT COURT OF
TULSA COUNTY, OKLAHOMA

HONORABLE EDWARD J. HICKS, JUDGE

AFFIRMED

Bernard Schwartz,
Tulsa, Oklahoma, Pro Se,

James H. Ferris,
John W. Cannon,
Moyers, Martin, Santee, Imel & Tetrick,
Tulsa, Oklahoma, For Appellee.

MEMORANDUM OPINION

Opinion by Larry E. Joplin, Judge:

Appellant Bernard Schwartz seeks review of the trial court's order granting judgment to Appellee Doc's Food Stores, Inc. (Store) in Store's action against Schwartz to collect on a check issued by Schwartz to a third-party and cashed by Store, but on which check Schwartz had

ordered payment stopped. In this appeal, Schwartz challenges the constitutionality of an award of attorney fees to Store in this small claims action; the constitutionality of the appellate filing fee; the trial court's admission of allegedly incompetent/hearsay evidence; and the trial court's finding of Store as a good faith holder in due course. Having reviewed the record, we find no error as alleged and affirm the trial court's judgment.

Briefly stated, Schwartz hired the third party, Garrison, to care for Schwartz's ailing wife. Schwartz testified that after two and one-half days of employment, Garrison demanded payment of $400.00. According to Schwartz, he argued with Garrison over the amount but ultimately executed a check payable to Garrison for the amount requested. The next day, a Saturday, Garrison obtained a "stop payment" from his bank on the check to Garrison. On the same Saturday, Garrison presented the check to Store for payment, and Store without notice of the stop payment order cashed the check. When the payor bank refused to honor the check, Store brought the instant small claims action against Schwartz to recover the amount of the check.

After hearing, the trial court found that Store occupied the status of a good faith holder in due course of Schwartz's check, and on that basis granted judgment to Store for $400.00. The trial court further ordered Schwartz to pay attorney fees in the amount of $200.00 and court costs of $67.00. Schwartz moved for reconsideration which the trial court denied. Schwartz appealed and the matter stands submitted on narrative statement. Rule 1.22, Rules of Appellate Procedure, 12 O.S. 1991, Ch. 15, App. 3.

Schwartz first challenges the trial court's award of attorney fees. We agree with Schwartz that under the American Rule, the prevailing party is not entitled to attorney fees *unless provided for by contract or statute. See, e.g., Sisney v. Smalley,* 690 P.2d 1048 (Okla. 1984); *Okla. Publishing Co. v. Miskovsky,* 654 P.2d 596 (Okla. 1982). Under the Oklahoma Small Claims Procedure Act, 12 O.S. 1991 §1751 et seq., any statute providing for an award of attorney fees applies in small claims action so long as an attorney makes an appearance in the case. 12 O.S. §1764. In that regard, Oklahoma statute permits an award of prevailing party attorney fees in an action to recover on a "negotiable instrument." 12 O.S. 1991 §936. The definition of "negotiable instrument" includes a check. 12A O.S. 1991 §3-104.

Schwartz asserts that 12 O.S. 1991 §937 controls all actions to collect on a check, arguing that prevailing party attorney fees may only be granted in actions on checks returned for insufficient funds or no account. However, we believe a full reading of this statute reveals our legislature's intent to create only a special notice provision for those classes of returned checks, not a limitation on an award of prevailing party attorney fees restricted to actions on those classes of returned checks. Accordingly, we hold that in all other actions to recover on a negotiable instrument, including a check returned for reasons other than the two enumerated in 12 O.S. §937, 12 O.S. §936 authorizes prevailing party attorney fees to be taxed as costs. Because the legislature has specifically provided for attorney fees in cases such as the instant case, we cannot say the trial court erred in its award of attorney fees. *See, e.g., Firemen's Ins. Co. of*

Newark, N.J. v. Renegar, 856 P.2d 595 (Okla.App. 1993) (trial court's judgment regarding attorney fees will not be disturbed absent an abuse of discretion).

Schwartz next challenges the constitutionality of the appellate filing fee requirement from a judgment in a small claims action, arguing that the required filing fee posts an unconstitutional barrier to the appellate process. On this issue, we note that our legislature – although generally requiring a filing fee for appeal of civil cases – has specifically provided an alternate avenue for the filing of appeals by those unable to pay the requisite filing fee. 20 O.S. 1991 §15. Schwartz made no claim for such relief in the present case and, in fact, paid the appellate filing fee, but a statute may not be attacked on constitutional grounds by one not injured thereby. *Dablemont v. State of Oklahoma, ex rel. Department of Public Safety,* 543 P.2d 563 (Okla. 1975). Schwartz having suffered no injury in the alleged particular, we consequently reject Schwartz's constitutional challenge.

Schwartz next asserts error by the trial court in allowing allegedly incompetent/hearsay as "the sole evidence" to support the trial court's determination that store honored and negotiated the subject check in good faith, arguing that reliance on such hearsay testimony deprived him of his constitutional right to confront witnesses. Specifically, Schwartz complains of testimony by Store's owner that his employee knew Garrison personally and had previously cashed checks for Garrison, without testimony by the employee to that effect.

On this issue, we first note that the agreed narrative statement includes Store owner's testimony that he personally knew Garrison as a regular customer. Thus, we cannot say, without a record to the contrary, that the testimony targeted by Schwartz constituted the sole evidence in support of the trial court's findings. Second, the the [sic] small claims procedure seeks to render fair, impartial and speedy justice, with the hearing and disposition of each action "informal." 12 O.S. 1991 §1761; *Black v. Littleton*, 532 P.2d 486 (Okla.App. 1975). Accordingly, the small claims court is not bound to adhere to the strict rules of evidence when such adherence interferes with the speedy and just determination of the issues. *Black*, 532 P.2d at 487. Moreover, the record bears out no objections by Schwartz at trial to the admission of the challenged testimony. We consequently find no abuse of discretion by the trial court in the admission of the questioned testimony as to require reversal.

Finally, Schwartz complains of the trial court's determination that Store stood as a good faith holder in due course of the check and, as such, entitled to recover thereon. Specifically, Schwartz asserts Store failed to exercise good faith or to observe reasonable commercial standards by honoring and negotiating the subject check without contacting either Schwartz or his bank in order to determine the validity of the check. 12A O.S. 1991 §3-103(a)(4) (definition of "good faith"); 12A O.S. 1991 §3-302(a)(2) (requirements of "holder in due course"). Alternatively, Schwartz argues that Store lost its status as holder in due course because the check was allegedly obtained by duress or illegality. 12A 3-305(A)(1) (defense of duress or illegality).

However, application of each of these provisions depend on proof of each of the respective elements. Thus, because application of these statutory provisions constitute questions of fact for the trier of fact, inasmuch as this matter stands submitted on narrative statement, we cannot say from review of the narrative statement that the trial court's express or implicit conclusions (1) that Store occupied the status of a good faith holder in due course of Schwartz's check, (2) that Store acted in a commercially reasonable manner, and/or (3) rejecting Schwartz's duress/illegality defenses lacks the requisite competent evidentiary support. *See, e.g., American Fertilizer Specialists, Inc. v. A.J. Wood, Jr.*, 635 P.2d 592, 593 (Okla. 1981); *Anglo-American Clothing Corp. v. Marjorie's of Tiburon*, 571 P.2d 427, 430 (Okla. 1977).

Finding competent evidentiary support for the trial court's judgment and the trial court's award of attorney fees unaffected by error of law or abuse of discretion, we consequently hold the orders of the trial court granting judgment and prevailing party attorney fees to Store should be and therefore are AFFIRMED.

JONES, P.J. AND GARRETT, J., CONCUR.

Supreme Court, U.S.
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No. 95-1937

In The

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October Term, 1995

BERNARD SCHWARTZ,

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v.

DOC'S FOOD STORES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Oklahoma, Division No. 1

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATUTE

12 O.S. § 936 (1991) 2, 3, 5, 7

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

I. REASONS FOR DENYING THE WRIT

Petitioner characterizes the matter appealed herein as a "piddling case" in that it is an action for recovery on a $400.00 check that was instituted by Respondent in the Special Division of the District Court of Tulsa County, State of Oklahoma (the "small claims court"). However, such case is pertinent to Respondent, a grocery store in a small community attempting to recoup a $400.00 check written by Petitioner. This small claims case is a simple holder in due course action, however, Petitioner has asserted numerous collateral issues in the appeal to the central issues asserted at trial in which remains one issue before the United States Supreme Court as to whether an award of attorney fees to prevailing parties are proper.

Controlling authority from the United States Supreme Court and the Oklahoma Supreme Court has held that state statutes authorizing an award of attorney fees to the prevailing party do not violate the United States Constitution. As the issue raised by Petitioner has been previously decided by this Court, no compelling reason exists for this Court to grant certiorari.

II. LEGAL ARGUMENTS

A. OKLAHOMA STATE STATUTE AUTHORIZING OF AWARD OF ATTORNEY FEES TO THE PREVAILING PARTY DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

The general rule applied in United States courts with respect to attorneys fees is that the prevailing party is not

entitled to an award for attorneys fees from the losing party absent state statute or contractual arrangements. *Aleyska Pipeline Serv. v. Wilderness Society*, 421 U.S. 241 (1975). Such rule is described as the "American Rule." *Id.* at 247. In the instant case attorney fees are authorized pursuant to Oklahoma state statute which provides as follows:

> In any civil action to recover on an open account, a statement of account, account stated, note, bill, negotiable instrument, . . . the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs.

12 O.S. § 936 (1991). Therefore, under the American Rule, attorney fees were proper in Respondent's underlying action to recover on a check which constituted a negotiable instrument. Petitioner contends that the statute violates the due process requirements of the Fourteenth Amendment to the United States Constitution.

The Oklahoma Supreme Court has specifically held in an action instituted in small claims court that a statutory right to attorneys fees does not violate the Fourteenth Amendment to the Constitution of the United States. *Thayer v. Phillips Petroleum Co.*, 613 P.2d 1041, 1045 (Okla. 1980). The *Thayer* Court found that "the statute is not only bottomed on a rational basis, but that it serves a compelling public interest, and that the distinction and classification drawn by it withstand the inspection of strict scrutiny" where fundamental rights and liberties are involved. *Id.* at 1045. In fact, the statute in *Thayer* allowed only a prevailing plaintiff an attorney fee award, not the defendant. The Court nevertheless upheld the

statute. *Id.* By contrast, in the instant case, the statute provides attorney fees for whomever is the prevailing party. 12 O.S. § 936.

The *Thayer* decision is in line with the seminal United States Supreme Court case dealing with the constitutionality of prevailing party attorney fees authorized by state statute. In *Missouri, Kansas & Texas Railway Co. v. Cade*, 233 U.S. 642 (1914), the losing party challenged the Texas statute authorizing prevailing party attorney fees in a small claims proceedings. The *Cade* Court held that the statute was not repugnant to the "due process" clause of the Fourteenth Amendment. *Id.* at 651. The Court reasoned that

> Even where the [attorney fee] statute to be considered as imposing a penalty upon unsuccessful defendants in cases within its sweep, such penalty is obviously imposed as an incentive to prompt settlement of small but well-founded claims, and as a deterrent of groundless defenses, which are the more oppressive where the amount involved is small.

Id. The statute's authorization of attorney fees only imposes "compensatory damages upon a defendant who, in the judgment of the legislature, unreasonably delays and resists payment of a just demand." As in the *Thayer* case, the statute in *Cade* only provided for an award of attorney fees to a prevailing plaintiff not a prevailing defendant, yet the Court upheld the provision. By contrast, in the instant case, the Oklahoma statute involved provides that the prevailing party, either plaintiff or defendant, may recover its attorney fees. Therefore, it is clear that under precedential decisions of the United

States Supreme Court, 12 O.S. Section 936 does not violate the Fourteenth Amendment of the United States Constitution.

The only authority cited by Petitioner to support his proposition is from the dissenting opinions decided by the Alaska Supreme Court. In fact, in most of the cases cited by Petitioner, the majority opinion upholds an attorney fee award authorized by state statute. *Bozarth v. Atlantic Richfield Oil Co.*, 833 P.2d 2 (Alaska 1992); *Sloan v. Atlantic Richfield Co.*, 552 P.2d 157 (Alaska 1976); *Van Huff v. Sohio Petroleum Co.*, 835 P.2d 1181 (Alaska 1992).

The *Van Huff* decision held that attorney fee statutes do not violate the state or federal constitutional guarantees of due process of law. *Van Huff*, 835 P.2d at 1185. The *Bozarth* decision held that one who has been forced to litigate in order to vindicate one's rights should rightly be reimbursed for litigation expenses. *Bozarth*, 833 P.2d at 4, n.3. These cases recognized a compelling governmental interest in the protection of parties forced to incur the financial burdens of attorneys fees arising in litigation.

Petitioner's argument of "right of access" is inapplicable to the instant case in that Respondent was the party attempting to vindicate its rights by bringing the action against Petitioner in small claims court. Moreover, either party under the Oklahoma statute challenged may obtain attorney fees if they are deemed the prevailing party. Respondent bore the risk of incurring the expense of pursuing the case to vindicate its rights and was awarded only a portion of its attorney fees. The elimination of the "loser-pays" rule would discourage parties who have

justifiable claims because of the inability to recover the cost of recovery of such claims. There exists abundant controlling authority upholding the constitutionality of the award of attorney fees to prevailing parties. Therefore, the Trial Court did not commit error in awarding Respondent its attorney fees and costs.

Petitioner further asserts that the Court of Appeals of Oklahoma, Division No. 1, failed to address the issues with respect to attorney fees awarded in Small Claims cases. This assertion is false. The Court of Appeals specifically addressed this issue stating that

> [1]Under the Oklahoma Small Claims Procedure Act, 12 O.S. 1991 § 1751 et seq., any statute providing for an award of attorney fees applies in small claims actions so long as an attorney makes an appearance in the case. 12 O.S. § 1764. In that regard, Oklahoma statute permits an award of prevailing party attorney fees in an action to recover on a "negotiable instrument." 12 O.S. 1991 § 936. . . . Because the legislature has specifically provided for attorney fees in cases such as the instant case, we cannot say the trial court erred in its award of attorney fees. See, e.g. *Firemen's Ins. Co. of Newark, N.J. v. Renegar*, 856 P.2d 595 (Okla.App. 1993) (trial court's judgment regarding attorney fees will not be disturbed absent an abuse of discretion).

(See App. I, pp. 3, 4). Petitioner further complains that the Court of Appeals did not properly consider constitutional issues raised in *Moore v. Local 569*, 53 F.3d 1054 (9th Cir. 1995), *cert. den.*, 116 S. Ct. 908 (1996). However, the *Moore*

case is not primary controlling authority in this jurisdiction. Furthermore, the *Moore* facts are considerably distinguishable from the instant case. *Moore* involved a collective bargaining agreement's attorney fee shifting provision in arbitration proceedings. The contract provision at issue in *Moore* provided for attorney fees only for a party who successfully defended an arbitration, not either party who prevailed. *Id.* at 1056. In the instant case, the statute authorizes an award of attorney fees to either plaintiff or defendant as prevailing party in a district court proceeding. The *Moore* Court struck down the fee shifting provision based upon the rights guaranteed members of labor organizations under 28 U.S.C. Section 411(a)(4), not under the United States Constitution. Consequently, the *Moore* case is not on all fours with the present case and should not apply to render prevailing party attorney fee statutes void. Therefore, the decision of the Court of Appeals of Oklahoma should stand.

B. THE QUESTION RAISED BY PETITIONER IS SETTLED AND HAS BEEN RESOLVED BY THIS COURT

The United States Supreme Court has consistently upheld state and federal statutes authorizing prevailing party attorney fees and the issue has been clearly resolved by this Court. *Fogerty v. Fantasy, Inc.*, 510 U.S. ___, 127 L.Ed. 2d 455 (1994) (holding that attorneys fees may be awarded to the prevailing party in copyright infringement case based upon the court's discretion); *Chicago & N.W.R. Co. v. NYE Schneider Fowler Co.*, 260 U.S. 35 (1922) (holding that a statute allowing a reasonable attorney's fee for failure to promptly settle a claim requiring

the plaintiff to litigate is not unconstitutional); *Iowa Life Insurance Co. v. Lewis*, 187 U.S. 337 (1902) (holding that a state statute allowing interest and attorneys fees was not in contravention to the Constitution of the United States). Prevailing party attorney fee statutes, as in this case, are equitable and in no way inhibit one's right to access to the courts. In fact, such statutes serve a compelling governmental interest in making the courts more accessible to a party which wants to recover a modest claim as is involved in the instant case.

III. CONCLUSION

The Oklahoma statute 12 O.S. Section 936 is narrowly drawn and satisfies a compelling governmental interest in making the courts more accessible to parties vindicating their rights. Consequently, the statute is not violative of Petitioner's right of due process under the Fourteenth Amendment to the Constitution of the United States. Therefore, Petitioner's Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX I.

NOT FOR PUBLICATION
IN THE COURT OF APPEALS
OF THE STATE OF OKLAHOMA

DIVISION NO. I

DOC'S FOOD STORES, INC., Appellee,	)	
vs.	)	Case No. 84,368
BERNARD SCHWARTZ, Appellant.	)	

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE EDWARD J. HICKS, JUDGE

AFFIRMED

Bernard Schwartz,
Tulsa, Oklahoma, Pro Se,

James H. Ferris,
John W. Cannon,
Moyers, Martin, Santee, Imel & Tetrick,
Tulsa, Oklahoma, For Appellee.

MEMORANDUM OPINION

(Filed Feb. 13, 1996)

Opinion by Larry E. Joplin, Judge:

Appellant Bernard Schwartz seeks review of the trial court's order granting judgment to Appellee Doc's Food Stores, Inc. (Store) in Store's action against Schwartz to collect on a check issued by Schwartz to a third-party and

cashed by Store, but on which check Schwartz had ordered payment stopped. In this appeal, Schwartz challenges the constitutionality of an award of attorney fees to Store in this small claims action; the constitutionality of the appellate filing fee; the trial court's admission of allegedly incompetent/hearsay evidence; and the trial court's finding of Store as a good faith holder in due course. Having reviewed the record, we find no error as alleged and affirm the trial court's judgment.

Briefly stated, Schwartz hired the third party, Garrison, to care for Schwartz's ailing wife. Schwartz testified that after two and one-half days of employment, Garrison demanded payment of $400.00. According to Schwartz, he argued with Garrison over the amount but ultimately executed a check payable to Garrison for the amount requested. The next day, a Saturday, Garrison obtained a "stop payment" from his bank on the check to Garrison. On the same Saturday, Garrison presented the check to Store for payment, and Store without notice of the stop payment order cashed the check. When the payor bank refused to honor the check, Store brought the instant small claims action against Schwartz to recover the amount of the check.

After hearing, the trial court found that Store occupied the status of a good faith holder in due course of Schwartz's check, and on that basis granted judgment to Store for $400.00. The trial court further ordered Schwartz to pay attorney fees in the amount of $200.00 and court costs of $67.00. Schwartz moved for reconsideration which the trial court denied. Schwartz appealed and the matter stands submitted on narrative statement. Rule

1.22, Rules of Appellate Procedure, 12 O.S. 1991, Ch. 15, App. 3.

Schwartz first challenges the trial court's award of attorney fees. We agree with Schwartz that under the American Rule, the prevailing party is not entitled to attorney fees *unless provided for by contract or statute. See, e.g., Sisney v. Smalley,* 690 P.2d 1048 (Okla. 1984); *Okla. Publishing Co. v. Miskovsky,* 654 P.2d 596 (Okla. 1982). Under the Oklahoma Small Claims Procedure Act, 12 O.S. 1991 § 1751 et seq., any statute providing for an award of attorney fees applies in small claims actions so long as an attorney makes an appearance in the case. 12 O.S. § 1764. In that regard, Oklahoma statute permits an award of prevailing party attorney fees in an action to recover on a "negotiable instrument." 12 O.S. 1991 § 936. The definition of "negotiable instrument" includes a check. 12A O.S. 1991 § 3-104.

Schwartz asserts that 12A O.S. 1991 § 937 controls all actions to collect on a check, arguing that prevailing party attorney fees may only be granted in actions on checks returned for insufficient funds or no account. However, we believe a full reading of this statute reveals our legislature's intent to create only a special notice provision for those classes of returned checks, not a limitation on an award of prevailing party attorney fees restricted to actions on those classes of returned checks. Accordingly, we hold that in all other actions to recover on a negotiable instrument, including a check returned for reasons other than the two enumerated in 12 O.S. § 937, 12 O.S. § 936 authorizes prevailing party attorney fees to be taxed as costs. Because the legislature has specifically provided for attorney fees in cases such as the instant case, we cannot say the trial court erred in its

award of attorney fees. *See, e.g., Firemen's Ins. Co. of Newark, N.J. v. Renegar,* 856 P.2d 595 (Okla.App. 1993) (trial court's judgment regarding attorney fees will not be disturbed absent an abuse of discretion).

Schwartz next challenges the constitutionality of the appellate filing fee requirement from a judgment in a small claims action, arguing that the required filing fee posts an unconstitutional barrier to the appellate process. On this issue, we note that our legislature – although generally requiring a filing fee for appeal of civil cases – has specifically provided an alternate avenue for the filing of appeals by those unable to pay the requisite filing fee. 20 O.S. 1991 § 15. Schwartz made no claim for such relief in the present case and, in fact, paid the appellate filing fee, but a statute may not be attacked on constitutional grounds by one not injured thereby. *Dablemont v. State of Oklahoma, ex rel. Department of Public Safety,* 543 P.2d 563 (Okla. 1975). Schwartz having suffered no injury in the alleged particular, we consequently reject Schwartz's constitutional challenge.

Schwartz next asserts error by the trial court in allowing allegedly incompetent/hearsay as "the sole evidence" to support the trial court's determination that Store honored and negotiated the subject check in good faith, arguing that reliance on such hearsay testimony deprived him of his constitutional right to confront witnesses. Specifically, Schwartz complains of testimony by Store's owner that his employee knew Garrison personally and had previously cashed checks for Garrison, without testimony by the employee to that effect.

On this issue, we first note that the agreed narrative statement includes Store owner's testimony that he personally knew Garrison as a regular customer. Thus, we cannot say, without a record to the contrary, that the testimony targeted by Schwartz constituted the sole evidence in support of the trial court's findings. Second, the the small claims procedure seeks to render fair, impartial and speedy justice, with the hearing and disposition of each action "informal." 12 O.S. 1991 § 1761; *Black v. Littleton*, 532 P.2d 486 (Okla.App. 1975). Accordingly, the small claims court is not bound to adhere to the strict rules of evidence when such adherence interferes with the speedy and just determination of the issues. *Black*, 532 P.2d at 487. Moreover, the record bears out no objections by Schwartz at trial to the admission of the challenged testimony. We consequently find no abuse of discretion by the trial court in the admission of the questioned testimony as to require reversal.

Finally, Schwartz complains of the trial court's determination that Store stood as a good faith holder in due course of the check and, as such, entitled to recover thereon. Specifically, Schwartz asserts Store failed to exercise good faith or to observe reasonable commercial standards by honoring and negotiating the subject check without contacting either Schwartz or his bank in order to determine the validity of the check. 12 O.S. 1991 § 3-103(a)(4) (definition of "good faith"); 12A O.S. 1991 § 3-302(a)(2) (requirements of "holder in due course"). Alternatively, Schwartz argues that Store lost its status as holder in due course because the check was allegedly obtained by duress or illegality. 12A 3-305(a)(1) (defense of duress or illegality).

However, application of each of these provisions depend on proof of each of the respective elements. Thus, because application of these statutory provisions constitute questions of fact for the trier of fact, inasmuch as this matter stands submitted on narrative statement, we cannot say from review of the narrative statement that the trial court's express or implicit conclusions (1) that Store occupied the status of a good faith holder in due course of Schwartz's check, (2) that Store acted in a commercially reasonable manner, and/or (3) rejecting Schwartz's duress/illegality defenses lacks the requisite competent evidentiary support. *See, e.g., American Fertilizer Specialists, Inc. v. A.J. Wood, Jr.*, 635 P.2d 592, 593 (Okla. 1981); *Anglo-American Clothing Corp. v. Marjorie's of Tiburon*, 571 P.2d 427, 430 (Okla. 1977).

Finding competent evidentiary support for the trial court's judgment and the trial court's award of attorney fees unaffected by error of law or abuse of discretion, we consequently hold the orders of the trial court granting judgment and prevailing party attorney fees to Store should be and therefore are AFFIRMED.

JONES, P.J. AND GARRETT, J., CONCUR.

Supreme Court, U.S.
FILED
JUL 10 1996
CLERK

(3)

No. 95-1937

In The

Supreme Court of the United States

October Term, 1995

BERNARD SCHWARTZ,

Petitioner,

v.

DOC'S FOOD STORES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Oklahoma, Division No. 1

PETITIONER'S REPLY MEMORANDUM

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July 10, 1996

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6 pp

PETITIONER'S REPLY MEMORANDUM

Respondent in No. 95-1937 rewrites the holdings in the cases cited in its opposing brief. This may be seen from analysis of the cases cited:

1) *Iowa Life Insurance Co. v. Lewis*, 187 U.S. 337 (1902), held a statute authorizing attorney fees against life and health insurance companies not repugnant to equal protection. The instant Petition claims a violation of due process, which is not met by the holding that life and health insurance companies are not denied equal protection by a loser-pays requirement only upon such insurance companies.

The *Lewis* Court also stated, *id.* at 355, that it was following "the case and its reasoning" in *Mutual Life Assn. v. Mettler*, 185 U.S. 308, 326 (1902), where the Court, stated,

> It is apparent . . . that this particular liability amounted to one of the conditions on which life and health insurance companies were permitted to do business in [the State], and the power of the State in . . . the imposition of conditions on its own and foreign corporations, has been repeatedly recognized by this court.

This rationale plainly does not apply in the instant case.

2) *Missouri, Kansas and Texas Ry. v. Cade*, 233 U.S. 642 (1914), rejected the claim that a loser-pays rule for plaintiffs suing railroads "for overcharges" was unconstitutional. It should, however, be emphasized that the statute there allowed only an attorney fee of $20 (even with inflation, far less than one day's attorney's fees today) and, as *Chicago & N.W. Ry. v. Nye-Schneider-Fowler*, 260

U.S. 35, 43 (1922), explained, under the *Cade* statute, "the attorney's fee . . . was manifestly only costs of suit" – i.e., the low statutory amount made the $20 fee part of the "costs" assessed since it did not require payment of actual attorney fees.

3) *Chicago & N.W. Ry. v. Nye-Schneider-Fowler,* 260 U.S. 35 (1922), upheld a statute requiring carriers who lost suits for property loss or overcharges to pay attorney fees. The court explained *Cade, supra,* and other cases:

> The general rule to be gathered from this extended review of the cases is that common carries . . . may be grouped in a special class to secure the proper discharge of their functions, and to meet their liability for injuries . . . and that a reasonable penalty may be imposed on them for failure promptly to consider and pay such claims, in order to discourage delays by them. This penalty or stimulus may be in the form of attorney's fees.

This rationale, too, is plainly inapplicable to the instant case.

More important is the fact that the above cases were decided well before this Court developed strict-scrutiny review in cases involving fundamental rights, such as that of access to the courts. To judge the loser-pays statute in this case by only the rational-basis test (the only review standard early in the century) would be similar to applying the rule in *Davis v. Massachusetts,* 167 U.S. 43 (1897), in a freedom of speech case today (It should be noted that, even under the narrow review test, *Nye-Schneider-Fowler, supra,* ruled invalid a requirement that the losing carrier pay appellate attorney fees, saying,

"This we do not think is fair play. Penalties imposed on one party for the privilege of appeal to the courts, deterring him from vindication of his rights, have been held invalid under the Fourteenth Amendment. . . . the principle applies to . . . so much of the statute as imposed an attorney's fee upon the carrier in this case in the [Nebraska] Supreme Court." *Id.* at 47-48. As the Petition shows, this can be said as well today of the loser-pays rule at the trial level.)

4) *Fogerty v. Fantasy, Inc.*, 114 S. Ct. 1023 (1994), upheld a statute providing, "the court may . . . award a reasonable attorney's fee to the prevailing party" in copyright cases. This Court stressed that the statute did not adopt "the British rule" because it used the word "may," stating, "The word 'may' clearly connotes discretion. The automatic awarding of attorney's fees to the prevailing party would pretermit the exercise of that discretion." *Id.* at 1033. The British rule's "automatic awarding of attorney's fees" is exactly what the challenged Oklahoma statute requires, since it provides that the prevailing party "*shall* be allowed" attorney's fees.

The Alaska cases referred to by respondent are not cited in the Petition for their holdings, but to show that, in the given case, it may be "true that the amount of the attorney's fee . . . charged is small, but if the State has the power to thus mulct them in a small amount it has equal power to do so in a larger amount. The matter of amount does not determine the question of right, and the party who has a legal right may insist upon it, if only a shilling be involved." *Gulf, Colorado Ry. v. Ellis*, 165 U.S. 150, 153-154 (1897).

Respondent also cites *Thayer v. Phillips Petroleum*, 613 P.2d 1041 (Oklahoma 1980). But it held only that a one-way loser-pays rule imposed on defendants who transfer cases from small claims court to the general jurisdiction court does not violate equal protection. Once again, that is not the question presented in the Petition.

The Petition itself pointed out that the fact-pattern in *Moore v. Local 569*, 53 F.3d 1054 (9th Cir. 1995), was not on all fours with the instant case. But the *Moore* court's rationale and language are directly applicable to this case. Indeed, this Court has used similar language, as quoted in the Petition, p. 8. Equally pertinent is the statement by Justice Goldberg:

> It has not been accident that the American litigant must bear his own cost of counsel . . . but a deliberate choice to ensure that access to the courts be not effectively denied those of moderate means . . . the English system [was] never accepted by us because of our conviction that it "favored the wealthy and unduly penalized the losing party." Concurring, in *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 237 (1964).

Justice Goldberg concluded his opinion:

> Judge Learned Hand once properly observed: "After now some dozen years of experience I must say that as a litigant I should dread a law suit beyond almost anything else short of sickness and death." I would not intensify that dread. *Id.* at 239.

For "that dread" to be further lessened, an answer by this Court to the question presented is now in order.

Respectfully submitted,

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Supreme Court, U.S.
FILED
SEP 24 1996
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No. 95-1937

In The

Supreme Court of the United States

October Term, 1995

BERNARD SCHWARTZ,

Petitioner,

v.

DOC'S FOOD STORES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Oklahoma, Division No. 1

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

Petitioner respectfully calls this Court's attention to the following matter not available at the time of Petitioner's last filing:

1. On September 23, 1996, Petitioner was served with a copy of a judgment of the Oklahoma District Court filed August 2, 1996, awarding Respondent $7627 in attorney fees incurred on appeal in the State of Oklahoma in this case. See Appendix. This award demonstrates dramatically the potential burden on the fundamental right of access to the courts by the instant Oklahoma statute mandating the English loser-pays rule in a case in Small Claims Court, in which the amount in controversy is $400. In particular, though the Oklahoma Supreme Court has ruled that "an attorney's fee request must bear some reasonable relation to the amount in controversy." *Southwest Bell v. Parker Co.*, 737 P.2d 1186, 1189 (Ok. 1987), Petitioner's right to appeal the appellate attorney fees award is definitely chilled by the prospect of having that award at least doubled if he appeals in the Oklahoma courts.

2. The August 2, 1996, judgement of the Oklahoma District Court indicates that that court has retained jurisdiction over an application filed by Respondent for "additional attorney fees and costs incurred by Plaintiff in proceedings still pending before the United States Supreme Court." The implication is that such fees and costs will be awarded if this Court decides against Petitioner. The

potential for such an award directly burdens the right guaranteed by the Constitution and statutes of the United States to bring proceedings in this Court claiming that a state statute violates the Constitution of the United States.

3. Petitioner respectfully requests this Court to hold its decision on his Petition for Certiorari until after the decision in *M.L.B. v. S.L.J.*, No. 95-853, since the decision there may be directly pertinent to this case.

Respectfully submitted,

BERNARD SCHWARTZ, Pro Se
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Tulsa, OK 74104

APPENDIX

IN THE DISTRICT COURT, SPECIAL JUDGES DIVISION
OF TULSA COUNTY, OKLAHOMA

DOC'S FOOD STORES, INC., Plaintiff,	)	
vs.	)	Small Claims No. 94-10104
BERNARD SCHWARTZ, Defendant.	)	

JOURNAL ENTRY OF JUDGMENT AWARDING ATTORNEY FEES AND COSTS ON APPEAL

(Filed Aug. 2, 1996)

Now on this 19th day of July, 1996, Doc's Food Stores, Inc. appearing through its attorneys James H. Ferris, and John W. Cannon, and Bernard Schwartz appearing pro se, this cause comes on regularly to be heard regarding a determination of attorney fees and costs on appeal as ordered. The court finds that the Plaintiff, Doc's Food Stores, Inc's counsels' time and billable rates are reasonable. The court therefore finds that Plaintiff is entitled to $7,627.00 pursuant to its Application filed herein for attorney fees incurred on appeal in the State of Oklahoma, and $80.51 in costs. The Court at this time makes no determination as to additional attorney fees and costs incurred by Plaintiff in proceedings still pending before the United States Supreme Court. The Plaintiff is also granted leave to make application for

costs for expert witness fees incurred in said hearing within thirty (30) days.

The instant Journal Entry of Judgment Awarding Attorney Fees and Costs on Appeal is supplement and in addition to the Journal Entry of Judgment entered herein on August 24, 1994, awarding Plaintiff $400.00 on his claim, including costs of $67.00 and an attorney's fee of $200.00.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that Plaintiff, Doc's Food Stores, Inc., have and recover as judgment against Defendant, Bernard Schwartz, for the sum of $7,627.00 in attorney fees and $80.51 in costs, for the total sum of $7,707.51, all of which let execution issue.

IT IS SO ORDERED THIS 2 day of August, 1996.

/s/ Edward Hicks
Judge of the District Court